

# Texas Heartbeat Act (S.B. 8) Litigation: Supreme Court Identifies Narrow Path for Challenges to Texas Abortion Law

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On December 10, 2021, the Supreme Court issued decisions in *United States v. Texas* and *Whole Woman's Health v. Jackson*. Both cases involved challenges to the Texas Heartbeat Act, also known as S.B. 8, a Texas state law that allows private citizens to sue healthcare providers and others who perform or abet abortions after a fetal heartbeat is detected. The plaintiffs in both cases claim that S.B. 8 is unconstitutional under Supreme Court abortion precedents such as *Roe v. Wade*.

The questions before the Court in *Texas* and *Whole Woman's Health* were whether the plaintiffs could challenge S.B. 8 before it was enforced against them and, if so, who the defendants should be. In its December 10 decision in *Whole Woman's Health*, the Court held that a constitutional challenge could proceed against certain Texas medical licensing officials, but not against Texas court officials, the state attorney general, or a private defendant. The Court **dismissed** *United States v. Texas* as improvidently granted. The Court's opinions in the two cases did not address the constitutional right to abortion or the continuing validity of *Roe v. Wade*.

A [previous Legal Sidebar](#) answered frequently asked questions about the S.B. 8 litigation prior to Supreme Court oral argument. This Legal Sidebar briefly summarizes the relevant legal background related to S.B. 8 and the novel procedural questions regarding challenges to the law. It next outlines the lower court proceedings in *Texas* and *Whole Woman's Health* before discussing the Supreme Court's decisions in the two cases. The Sidebar concludes with selected considerations for Congress related to the S.B. 8 litigation.

## The Texas Heartbeat Act

**S.B. 8** prohibits physicians from performing or inducing an abortion after a fetal heartbeat is detected (generally once an embryo reaches a gestational age of six weeks), unless the physician believes that a medical emergency requires the procedure. The statute does not authorize civil or criminal proceedings against a [woman who seeks or obtains an abortion](#). However, it imposes civil liability on other persons

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who perform or induce an abortion in violation of S.B. 8; aid or abet such an abortion; or intend to perform, induce, or aid or abet such an abortion.

S.B. 8 is novel from a procedural standpoint because it is enforceable only through private civil actions. Most state laws regulating abortion authorize civil or criminal enforcement by government actors. For example, the [Mississippi Gestational Age Act](#) at issue in a separate Supreme Court case, *Dobbs v. Jackson Women's Health Organization*, allows the state attorney general or the Mississippi State Board of Medical Licensure to bring a civil suit to enforce the statute. By contrast, S.B. 8 expressly bars state officials from enforcing its prohibition and instead authorizes enforcement only through civil suits by non-state actors. If an S.B. 8 plaintiff is successful, a court is to award injunctive relief to prevent the defendant from violating S.B. 8, damages of not less than \$10,000 for each unlawful abortion performed or induced, and legal costs and attorney's fees. In addition to imposing civil liability, S.B. 8 contains several procedural [provisions](#) that [increase](#) the litigation [burden](#) on defendants accused of performing or aiding prohibited abortions who seek to defend their actions in court.

## Novel Questions in Constitutional Challenges to S.B. 8

Supreme Court cases such as *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* limit the ability of the states to prohibit abortion before fetal viability, which generally occurs at 23 weeks or greater in a pregnancy. By banning almost all abortions in Texas after six weeks of pregnancy, S.B. 8 appears to conflict with *Roe* and *Casey*. However, Texas included several procedural features in S.B. 8 to limit the ability of persons affected by the statute to challenge its constitutionality in court under traditional theories.

Claims that a statute is unconstitutional generally proceed in [one of two postures](#). In an *offensive* or *pre-enforcement challenge*, people who are subject to an allegedly unconstitutional law file suit before the law is enforced against them, seeking a court order preventing enforcement. In a *defensive* or *post-enforcement challenge*, defendants in a civil or criminal case argue as a defense that the law is unconstitutional. To challenge a law in a defensive posture, challengers generally must first violate the law and face suit or criminal charges. This chain of events means that challengers cannot choose whether or when a case will be filed—if the government or third parties do not enforce the law, a defensive challenge is not possible. It also may limit the ability of challengers to proceed in their preferred court. A defensive challenge may require challengers to incur significant legal risk, as they must violate the law and face criminal or civil liability before a court even considers whether it is unconstitutional. (Criminal sanctions are not a concern in the current cases, however, because S.B. 8 imposes only civil liability.)

Thus, when possible, persons challenging a law on constitutional grounds often prefer to do so in an offensive posture. Pre-enforcement constitutional challenges to state laws often proceed via suits against state officials charged with enforcing those laws under *Ex parte Young*. (That procedure is necessary because the doctrine of [state sovereign immunity](#) generally bars individuals from suing a state directly without the state's consent.) Proponents of S.B. 8 have stated that the statute bars enforcement by state officials [in order to prevent](#) such pre-enforcement suits.

Other aspects of S.B. 8 may limit both offensive and defensive challenges to the law. Suits challenging abortion regulations are often brought by women seeking abortions, or by abortion providers, who may be permitted to raise constitutional claims [on behalf of their patients](#). However, S.B. 8 does not impose liability on women who seek or obtain abortions, which may [limit the ability](#) of those women to challenge the law, even if it effectively restricts their access to abortion. The statute also [expressly limits](#) the ability of defendants—including abortion providers or those who aid or abet prohibited abortions—"to assert the rights of women seeking an abortion."

## S.B. 8 Litigation

Both *Whole Woman's Health v. Jackson* and *United States v. Texas* raised the question of whether and how opponents of S.B. 8 could bring pre-enforcement suits to challenge the law's constitutionality.

In *Whole Woman's Health*, a number of abortion providers and advocates brought suit in a federal district court in Texas. The defendants included a private individual who had threatened to sue under S.B. 8; the Texas attorney general; clerks and judges of Texas state courts that could hear claims brought under S.B. 8; and certain state medical licensing officials. The plaintiffs filed suit before the September 1, 2021, effective date of S.B. 8, seeking to prevent the statute from taking effect. The district court refused to dismiss the case, but the U.S. Court of Appeals for the Fifth Circuit stayed the district court proceedings.

On August 30, 2021, the plaintiffs filed an emergency application for injunctive relief in the Supreme Court, seeking to prevent the enforcement of S.B. 8 while the appeal continued in the Fifth Circuit. The Supreme Court denied the application on September 1, 2021, shortly after the statute went into effect. In a short, unsigned opinion, the Court stated that the plaintiffs "have raised serious questions regarding the constitutionality of the Texas law at issue. But their application also presents complex and novel antecedent procedural questions on which they have not carried their burden." Chief Justice Roberts and Justices Breyer, Sotomayor, and Kagan each wrote a dissent.

Separately, in *Texas*, the United States sued the State of Texas, in part as a way to avoid the defense of sovereign immunity that Texas raised against the private plaintiffs in *Whole Woman's Health*. The district court granted a preliminary injunction against S.B. 8, but a subsequent ruling of the Fifth Circuit allowed the statute to take effect as the litigation continued.

In both cases, the plaintiffs sought Supreme Court review before the Fifth Circuit reached a judgment. On October 22, 2021, the Supreme Court granted writs of certiorari before judgment in *Whole Woman's Health* and *Texas*. Certiorari before judgment essentially allows a case to skip the court of appeals and instead move directly to the Supreme Court. Under Supreme Court Rule 11, a petition for a writ of certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." The Court has historically granted such petitions sparingly. The Court held oral argument in both cases on November 1, 2021, ten days after the grant of certiorari. One commentator observed that the highly compressed briefing and argument timeline was "a near record reminiscent only of the court's speed in resolving the 2000 presidential election in *Bush v. Gore*." Over a dissent from Justice Sotomayor in *Texas*, the Court allowed S.B. 8 to remain in effect while it considered the cases.

In their briefs and at oral argument, both the private plaintiffs and the United States argued that they were authorized to challenge S.B. 8 and that to rule otherwise would allow Texas to burden a recognized constitutional right without effective recourse in the federal courts. The State of Texas countered that none of the challengers had demonstrated that the federal courts had jurisdiction over their claims, the requested remedies were improper, and S.B. 8 was constitutional.

## Supreme Court Decisions in *Whole Woman's Health* and *Texas*

On December 10, 2021, the Court ruled in *Whole Women's Health* that a subset of the private plaintiffs' challenges to S.B. 8 could proceed. Justice Gorsuch authored the opinion of the Court, plus one section signed by four Justices; Justice Thomas concurred in part and dissented in part; and both Chief Justice Roberts and Justice Sotomayor filed opinions concurring in the judgment in part and dissenting in part. Justice Gorsuch summarized the import of these multiple opinions: the Court unanimously held that suit could not proceed against state court judges or the sole private defendant; five Justices further held that the plaintiffs could not sue state court clerks or the Texas attorney general; eight Justices held, however, that the suit could proceed against the state medical licensing officials.

Justice Gorsuch, joined by Justices Thomas, Alito, Kavanaugh, and Barrett, held that the private S.B. 8 challengers [could not sue state judges or clerks](#) because judicial officers are not subject to suit under *Ex Parte Young*. Justice Gorsuch explained that clerks docketing cases and judges neutrally interpreting the law are not adverse to those who oppose the law, and if judges err in applying an unconstitutional law to a defendant, their decisions can be appealed. The majority further opined that the challengers failed to identify a limiting principle that would allow suits against judicial officers in the context of S.B. 8 without broadly authorizing federal courts to block state courts from hearing state law claims. With respect to the state attorney general, the majority held that the suit [could not proceed](#) against him because he lacked the authority to enforce S.B. 8. With respect to the private defendant, the full Court agreed that the suit against him [should be dismissed](#) because he disclaimed any intent to sue under S.B. 8.

The majority emphasized that the Court's decision was limited to procedural questions, [stating](#) that "the ultimate merits question—whether S. B. 8 is consistent with the Federal Constitution—is not before the Court. Nor is the wisdom of S. B. 8 as a matter of public policy." It also stressed that pre-enforcement suits in federal court are only [one of several possible avenues](#) through which opponents of S.B. 8 could challenge the law's constitutionality, including lawsuits in state court and defensive challenges. The majority explained that some constitutional claims can only proceed in a defensive posture: "unlike the petitioners before us, those seeking to challenge the constitutionality of state laws are not always able to pick and choose the timing and preferred forum for their arguments. This Court has never recognized an unqualified right to pre-enforcement review of constitutional claims in federal court."

In a section of his opinion joined by only three other Justices, Justice Gorsuch concluded that the private plaintiffs' suit [could proceed against the state licensing officials](#). He determined that those officials had some power to enforce the statute under their general authority to implement Texas's Health and Safety Code and, "[o]n the briefing and argument before us, it appears that these particular defendants fall within the scope of *Ex parte Young*'s historic exception to state sovereign immunity."

Justice Thomas [concurred in part and dissented in part](#). He argued that the challengers "may not maintain suit against any of the governmental respondents under *Ex parte Young*," and further would have held that the challengers lacked Article III standing to challenge S.B. 8.

Chief Justice Roberts, joined by Justices Breyer, Sotomayor, and Kagan, filed an opinion [concurring in the judgment in part and dissenting in part](#). He wrote that with S.B. 8, "Texas has employed an array of stratagems designed to shield its unconstitutional law from judicial review" and thus "effectively chill the provision of abortions in Texas" in violation of *Roe* and *Casey*. The Chief Justice argued that the Texas attorney general was an appropriate defendant because he "maintains authority coextensive with the Texas Medical Board to address violations of S. B. 8." He further asserted that the suit should go forward against the state court clerks because "the mere threat of even unsuccessful suits brought under S. B. 8 chills constitutionally protected conduct," and court clerks are "unavoidably enlisted in the scheme to enforce S. B. 8's unconstitutional provisions."

Justice Sotomayor, joined by Justices Breyer and Kagan, also filed an opinion [concurring in the judgment in part and dissenting in part](#), arguing that the private plaintiffs' suit should proceed against the Texas attorney general and state court clerks. Identifying the question before the Court as "whether States may nullify federal constitutional rights by employing schemes like the one at hand," Justice Sotomayor called the majority opinion a "dangerous departure from [the Court's] precedents, which establish that federal courts can and should issue relief when a State enacts a law that chills the exercise of a constitutional right and aims to evade judicial review."

Concurrently with its decision in *Whole Woman's Health*, the Supreme Court [dismissed](#) *United States v. Texas* as improvidently granted. [Dismissal as improvidently granted](#) indicates the Court's determination that it should not have granted certiorari and disposes of the case without a substantive decision. Justice Sotomayor dissented from the dismissal. Having held that the private plaintiffs in *Whole Woman's Health*

could sue certain state officials under *Ex Parte Young*, the Court may have dismissed *Texas* because there was less need to decide whether the United States could challenge S.B. 8 under a different legal theory.

## Considerations for Congress

The Supreme Court's December 10, 2021, decision in *Whole Woman's Health* remanded the case to the district court, where litigation challenging S.B. 8 may now proceed with the state medical licensing officials as defendants. The Supreme Court has not stayed enforcement of S.B. 8, and the statute remains in effect at the time of writing. Four Supreme Court Justices [urged](#) the district court to "resolve this litigation and enter appropriate relief without delay." Separate [proceedings in state court](#) could also influence enforcement of S.B. 8. On December 9, 2021, a Texas state court judge issued a [declaratory judgment](#) holding that S.B. 8 violates the Texas constitution "and should not be enforced or applied in Texas courts," but declined to issue an injunction pending further litigation on the merits.

Although the challenges to S.B. 8 in *Whole Woman's Health* and *Texas* invoke the constitutional right to abortion, the Supreme Court's December 10, 2021, decisions did not address the substance of the Court's prior abortion jurisprudence, including *Roe* and *Casey*. The Supreme Court is considering whether all pre-viability prohibitions on elective abortions are unconstitutional in a separate case, [Dobbs v. Jackson Women's Health Organization](#). The Court's decision in *Dobbs*, expected later this term, could affect the constitutional analysis in the ongoing state and federal court litigation regarding S.B. 8.

Congress could also enact legislation related to abortion that could affect enforcement of S.B. 8. For instance, the Women's Health Protection Act (WHPA) (H.R. 3755/S. 1975) would grant health care providers a statutory right to provide abortion services and would preempt any state law that limits or restricts that right. The WHPA would also establish a corresponding right for patients to obtain abortion services unimpeded by state law restrictions such as pre-viability abortion prohibitions. If enacted, the WHPA could be construed to preempt S.B. 8. The House of Representatives passed the WHPA on September 24, 2021, and the bill is awaiting further consideration in the Senate.

The more direct impact of *Whole Woman's Health* concerns the ability of states to enact legislation that limits the exercise of constitutional rights but evades federal judicial review. Following Texas's enactment of S.B. 8, [other states](#) are exploring similar private enforcement mechanisms for statutes that might conflict with the Constitution or federal statutory law. The [federal government](#), some [commentators](#), and [both](#) of the [dissents](#) in *Whole Woman's Health* have expressed [concerns](#) that states might enact legislation authorizing private civil suits that effectively nullify other existing rights under federal law. For example, the [Firearms Policy Coalition](#) filed an *amicus curiae* brief in *Whole Woman's Health* arguing that a similar strategy could be used to infringe the right to bear arms under the Second Amendment. On December 11, 2021, California Governor Gavin Newsom [announced](#) a plan to develop legislation modeled on S.B. 8 to allow private civil suits against "anyone who manufactures, distributes, or sells an assault weapon or ghost gun kit or parts in the State of California."

The Supreme Court's decision in *Whole Woman's Health* does not fully resolve these questions. While the Court allowed a subset of the current pre-enforcement challenges to S.B. 8 to go forward, it appears states might be able to draft legislation to further [limit such claims in future cases](#). It is possible that opponents of such laws could effectively challenge them in state court, perhaps in a defensive posture, or that challengers could identify proper defendants for future pre-enforcement federal suits on a case-by-case basis.

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